(1)

86-707

DOCKET NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

FREDERICK G. JENSEN,
PETITIONER,

v.

COUNTY OF LANCASTER and
NOVELLA W. ABBOTT, Treasurer,
RESPONDENT,

In The Matter Of

A PETITION FOR WRIT OF CERTIORARI
TO SUPREME COURT OF VIRGINIA
At Richmond

Frederick G. Jensen
Pro se
P. O. Box 372
Irvington, VA 22480

19 pp

QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction to hear a case in which the State of Virginia orders a taxpayer to pay a tax which will be used to support allegedly legal abortions?

2. Whether this case presents substantially the same question as number (2) in Jensen v. U.S., Docket No. 86-278: Does petitioner have a right to be heard based on the law that abortion on demand is an act *mala in se* and a great and heinous misdemeanor that is indictable under the common law?

3. Whether declaratory relief, such as was granted in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973) is a practical remedy for clearing up the right-to-life question arising upon that decision, or whether relief herein may be had by other appropriate means.

CONTENTS

AUTHORITIES

Page

CASES CITED:

STATUTES CITED:

UNITED STATES CODE

U. S. Supreme Court Rules

Docket No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

Frederick G. Jensen,

petitioner,

v.

Lancaster County and

Novella W. Abbott, Treasurer

In The Matter Of

A PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

At Richmond

OPINION BELOW

Petitioner before the United States Supreme Court, October Term 1986, is Frederick G. Jensen, a petitioner in the Supreme Court of Virginia, in the case of Jensen v. County of Lancaster, Novella W. Abbott, Treasurer, Record No. 860206, for an appeal denied, where the petitioner failed to pay the County personal property tax on account of abortion, i.e., the termination of the life

of the unborn, alleged to be legal. The appeal was denied 30 September 1986.

JURISDICTION

Title 28, Section 2104: An appeal to the Supreme Court from a State court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been r n-dered in a court of the United States. See Section 1254 (1).

Title 28, Section 2106: The Supreme Court....may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought be-fore it..., and may remand the cause direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Title 28, Section 2101 (c) Any other ap-peal or any writ of certiorari intended to bring any judgment or decree in a

civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree...

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on a writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefore, or fails to obtain an order granting his applica-

tion, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

A copy of petitioner's motion, requesting the Virginia Supreme Court to withhold its mandate upon its decision handed down 30 September 1986, was filed 6 October 1986 and is included in the appendix. The following rules of the U.S. Supreme Court concern its jurisdiction in this case.

FEDERAL RULES:

Rule 17: ....The following indicate the character of the reasons that will be considered.

(c) When a state court...of appeals has decided an important question of federal law which has not been, but should be, settled by this Court,...

Rule 18: ...to the extent that the said rule may, by reason of the imperative

public importance (of this case) and to require immediate settlement by this Court.

Such a question is the public importance of the survival of the unborn victims of feticide under the widely held belief that such feticide is not generally punishable by law.

STATEMENT OF THE CASE

In the October 16th trial in 1985, in District Court, Lancaster County Courthouse, Lancaster, Virginia, Hyde, J., presiding, defendant raised, among other things, a question about the market value, i.e., the basis of the County assessed valuation, of a Mazda light truck owned by defendant, which was then under a tax lien by the Internal Revenue Service for non-payment of federal taxes. The District Court held the market value for local tax purposes was not altered by any consideration of the fact the

vehicle was owned under a federal tax lien. Thus, the details of the tax are matters adjudicated and no longer part of this dispute.

This vehicle was subsequently auctioned by the I.R.S. and is the same one noted in U.S. Supreme Court Docket No. 86-278. On 17 September 1986, prior to the decision of the Virginia Supreme Court on the petition for an appeal, another trial was had in Lancaster Courthouse, County District Court, where it was held additional taxes of $72.20 were due on the same vehicle.

Result: The Virginia Supreme Court's attempt to uphold the Circuit Court does not agree with the County's claim that the only question is the size of the tax (under $500) and therefore is not adjudicable by the Court. The case turns not on a matter of fact, but on one of law.

Upon payment of the $101.16 bond required, defendant-appellant went to Circuit Court 10 December 1985, Judge Dixon L. Foster, for a hearing to set a date for his appeal asking, repeatedly, would the Court hear appellant's legal and constitutional objections to taxes supporting abortion laws. The Court at last responded, it had no choice but to order the tax paid.

Effectively, then, it is the trial court which is upheld. The great argument there is, What happens if all those with small complaints fail to pay any taxes to government?

STATEMENT OF FACTS

1. Appellant refused to pay a county personal property tax.

2. The county treasurer sued to collect.

3. Appellant defends, no tax is due where government engages in non-

legal acts.

4. Government has failed to review its own actions in regard to so-called legal abortions.

REASONS FOR GRANTING WRIT

1. Petitioner has always been aware of legal and constitutional errors in the Roe v. Wade decision, above. The more he studies, the more such errors he finds, while commentators and students in law do not seem to apprehend them.

2. Petitioner's theory of government is that since we have no king wielding sovereign power over us, it is the citizen himself who is sovereign in-as-much-as he shares power with others. Therefore, he is under an obligation to raise a hue-and-cry, as it were, when errors leading to practical genocide are said to be law.

3. Neither State nor Federal courts have granted petitioner standing[1]

nor taken jurisdiction, so as to hear petitioner's arguments on the sole material question here. It is only fair and just that petitioner, who would like to see his taxes put to legal uses only, be given his remedy that he may pay in true peace of mind.

ARGUMENT

1. It is clear there is no question about error, legality, or constitutionality in the matter of the property tax levy of Virginia. Further, there may be no other question, if the judgment made by the District Court of the County of Lancaster reached the question of tax expenditure for abortion and its legality and/or constitutionality.

In order to validate such decision: (Four points follow.)

(1) The record must show such decision made in sufficient detail to permit the court's order to stand. White

v. Washington Public Power Supply System 692 F. 2d 1286, C.A., Wash. (1982). In the cited case a judgment against a certain person among many noted in the record failed because the name of the person did not appear in the court's order. In this case the word, abortion, appears in the Circuit Court's final order, but no distinct determination is made as to the question this controversial legal term raises, nor its relation to an expenditure of taxes.

(2) Such a decision, if made, is a metter res judicata and, appeal must be based on a question undecided. Greyhound Lines Inc. v. Cobb County, Ga. 523 F. Supp. 422.

In the cited case the bus company was successfully sued by riders for an accident between the bus and a county vehicle. In turn the bus company sued the County to force payment of a share

of the damages based on its contributory negligence.

The court said, "The Georgia Supreme Court has held that in order for the principles of res judicata to apply so as to bind plaintiff....the cause of action must be the same." and further, "The court did not veer from that holding (in another case)....when it found the principle of res judicata to preclude....subsequent state court suit. The court...clearly stated its finding that the second suit was barred because it was founded upon factual allegations identical to those found in the first suit.

The court split the damages 60-40.

In this case the courts nowhere distinguished between tax levies as distinct from expenditures. No judgment as to expenditure was made. That

is a different case entirely.

While the Circuit Court judge in this case was unable to recognize that there was a different factual case when one considered taxes as money spent rather than money collected, it is clear he refused defendant-appellant's right to question expenditures for abortion. At the appellate level of the Virginia Supreme Court, though the Court claimed it read the briefs, it made no comment on any question. It simply upheld the courts below. Comparative fault was upheld in the following case cited in Greyhound, above: 681 F. 2d 1327 (Cir. D.C.), 559 F. Supp. 361.

(3) A prior decision is the "law of the case" unless the prior decision is clearly erroneous and works a manifest injustice. Yankton Sioux Tribe of Indians v. Nelson, 604 F. 2d 1146, 1155.

The court cited said, "A prior decision in a case is the "law of the case" in all subsequent proceedings unless:

/2/ The prior decision is clearly erroneous and works manifest injustice". Citing, Continental Bank & Trust Co. v. American Bonding, 630 F. 2d 606, 608 (8th Cir., 1980).

In this case, too, injustice is worked where the courts have refused to hear complaints that the abortion case, Roe v. Wade, above, failed to decide when the life begins in law. It is not at all clear that the Court meant to curb such rights as the unborn has at law.

(4) Prior error producing manifest injustice must be such as to make a prima facia case. Perkins-Elmer Corp. v. Computervision Corp. 732 F. 2d 888, 900 (C.A.F.C., 1984).

The citation reads, "Computervision has not made a prima facia showing that the finding of an allegedly non-existent difference constituted a clear error producing manifest injustice."

In this case the courts have failed to acknowledge the distinction between tax levy collections and tax revenue appropriations. They have not granted appellant his right to complain about government's encouragement of the destruction of some unborn. Who will deny a million abortions a year, with a fetal death to live-birth ratio of one to three, is a statistical horror impossible to ingest rationally?

CONCLUSION

1. It is clear from statute and cases cited and discussed that, the Supreme Court of the United States has jurisdiction to cope with the question presented because it offers a material

question of constitutional law.

2. Jensen v. U.S., a federal income tax case, Docket No. 86-278 presents the same question as this case, which concerns a Virginia personal property tax.

3. Declaratory relief granted in this case could restore to the legislatures of the nation regular law-making power in aid of the common law in modern fields: e.g., contraception, abortion, and medical experimentation with, and sale of, the sexfactors of human life in cases where laws regarding fornication, adultery, buggery, divorce, and marriage are involved.

---

[1] As early as 1814 the General Court of Virginia refused to hold a litigant protesting waste of tax money in contempt. Stokeley v. Commonwealth, Virginia Reports, Vol. III. p. 330.

The special v. general fund distinction, as a means of avoiding accountability on the part of responsible officials in authority, may not have been in existence in 1812-14.

More recently, pro-abortion taxpayer

Respectfully submitted,

/S/_____
Frederick G. Jensen
Pro se
P. O. Box 372
Irvington, Virginia
22480

October 1986

---

had standing to challenge the tax exemption of a church supporting pro-life activists. Claim was the tax exemption affected the pocket-books of the taxed pro-aborts. Abortion Rights Mobilization v. Regan, (D.C.N.Y.; 1982) 50 AFTR 2d 82-5366, 544 F. Supp. 471. Case may yet be in the courts on the standing question as of October 1986.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 30th day of September, 1986.

Frederick G. Jensen, Appellant,

against Record No. 860206
Circuit Court No. 94-85

Novella W. Abbott,
Lancaster County Treasurer, Appellee.

From the Circuit Court of
Lancaster County

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

VIRGINIA: Book 1985, Page 643

IN THE CIRCUIT COURT OF LANCASTER

County of Lancaster
Novella W. Abbott, Treasurer,
Plaintiff

VS.

Frederick G. Jensen
P. O. Box 372
Irvington, Virginia 22480

FINAL ORDER

This cause came on the 10th day of December, 1985 on an an (sic) ap-;eal from the Lancaster County General District Court, Lancaster, Virginia by Frederick G. Jensen, the defendant in the above styled case and in the presence of C. Jeffers Schmidt, Jr., the Commonwealth's Attorney of the aforesaid County; and upon evidence of Frederick G. Jensen, taken ore tenus before this Court.

The defendant stated in open Court that he was willing to pay his taxes as charged in the warrant and agreed to do so, the reason for appeal

from Gen. Dist. Ct., is that the County must not use the money for abortion etc.

The Court doth Adjudge and Order that the defendant pay the amount of this Judgment plus costs making a total of $22.00 . (sic)

ENTER-LAW
December 23, 1985

/S/ Dixon L. Foster
Judge

A TRUE COPY
TESTE: Bertha G. Abbott,
Clerk.

N. B. A second order exists, apparently for the purpose of making corrections. It was postdated to the date, 23 December 1985. Notice of appeal was filed on 19 December 1985 with the Clerk of the Circuit Court, Lancaster County, within the ten days allowed by law of the order of the Court orally given at the hearing.

IN THE SUPREME COURT OF VIRGINIA AT RICHMOND

Frederick G. Jensen, Appellant

v. Record No. 85-922

Novella W. Abbott,
County Treasurer, Appellee

PETITION FOR AN APPEAL

To: The Honorable Justices of the Supreme Court of Virginia

Appellant Frederick G. Jensen is aggrieved by certain taxes, penalty and interest made payable under a final order entered by Lancaster Circuit Court on December 23, 1985 in a proceeding wherein the appellee was Novella W. Abbott who is the Lancaster County Treasurer.

STATEMENT OF MATERIAL PROCEEDINGS IN THE LOWER COURT

Defendant, Frederick G.Jensen, appeared in Lancaster General District Court, a court not of record, on 16 October 1985 on a warrant-in-debt issued for the favor of Novella W. Abbott,

Lancaster County Treasurer, for non-payment of taxes in the amount of $101.16, including principal, interest, and penalty. The tax consists wholly of personal property taxes levied on a "Mazda" pick-up truck, year model 1982.

This same vehicle was under a tax lien, posted on the Courthouse door, of the Federal government to benefit of the Internal Revenue Service when the same personal property tax was levied, and then was subsequently sold at auction by the Federal government in Kilmarnock, Virginia.

Defendant explained to the court he had paid no taxes since 1978 because of the way the various governing entities pay for and underwrite abortions and supporting service. He raised oral questions about the legality of abortion law in our State, Title 18.2-71 to 74.1 and the constitutionality of de-

priving the unborn of life under Article I, Sections 1 and 11 of the Virginia Constitution, and Amendments to the United States' Constitution Five and Nine. Defendant raised a second question as to the market value of the property, on which the assessed valuation was legally based.

The Court upheld the amount of the tax and discounted the statements concerning the legality and constitutionality of abortion. Defendant thereupon reiterated his willingness to appeal to the Circuit Court the questions of legality and constitutionality.

Appellant appeared before the Lancaster Circuit Court on 10 December at a hearing to set a trial date on the issue remaining, the legality and constitutionality of services to make abortions possible. However, the Court stated it would issue its own order that

the taxes be paid.

ASSIGNMENTS OF ERROR

The circuit courts of the Commonwealth of Virginia as general courts of law and equity have power to hear, try and decide on appeal questions de novo coming up from courts not of record, including the constitutional ones of the abortion statutes. N. B. V.C. §16.1-93; Virg. Const. Art. I, Sec. 11. The order of the Circuit Court allows the revenue in dispute to be spent, in part, to pay for abortions illegally and not constitutionally performed, together with ancillary services in support, consultation, and referral.

QUESTIONS INVOLVED

1. Has Appellant failing payment of $101.16 in taxes to Lancaster County standing to complain about spending this money, in part, for illegal and unconstitutional aborticides and re-

lated services?

2. Does the Court have jurisdiction to hear the plea concerning expenditures made under statutes V. C. § 18.2-71 to 74.1 and contrary to the Constitution of the Commonwealth of Virginia, Art. I, Sections 1 and 11, and the Vth and IXth of the United States Constitution's amendments?

3. Is the unborn human product a legal person at any time so as to have inherently the inalienable constitutional right to life and its security, liberty to possess the peace to become and grow normally and naturally, and the happiness of leaving freely the murkiness of the womb for the light of day? Va. Const. Art. I, Sec. 1 and Sec. 11, and the Vth and IXth Amendments of the U.S. Constitution.

4. Notwithstanding any rights of the unborn to life, liberty, and

happiness, is there a question of some legality or constitutionality concerning V. C. § 18.2-71 to 74.1, which seeks to regulate certain aborticides done by physicians and others licensed by the Virginia Board of Medicine, since the statute is vague, confusing, and contradictory on its face?

STATEMENT OF FACTS

On 10 December 1985 appellant appeared pro se before Circuit Court in the Courthouse, Lancaster County, Judge Dixon L. Foster presiding at a hearing to set a date for his appeal from District Court. Appellant averred his tax question was settled in the court below and stated there was no dispute as to facts on the questions of his personal property tax payment, and its public expenditure for abortion purposes. He said further that on expenditures to make abortions possible, he had raised

constitutional and legal questions under the Virginia Commonwealth Constitution (Art. I, Secs. 1 and 11), the United States' Constitution (Vth and IXth Amendments), and V.C. §18.2-71 to 74.1. Therefore, appellant asked if the Court would decide constitutional and legal objections to the public expenditure of tax revenues for abortion purposes.

The Court replied it had no alternative in this case, but to order the taxes paid saying, "I will so order."

Appellant received no copy of the order of the Court prior to 19 December 1985 and appealed to the Supreme Court of the Commonwealth of Virginia.

The order of the Court was entered on 23 December and rewritten subsequent to 17 January 1986.

A written statement of facts was dated 6 February 1986.

ARGUMENT AND AUTHORITIES

(1) This petition for an appeal is brought under statute, V.C. § 8.01-670, which states:

> A. Any person may present a petition for an appeal in the Supreme Court if he believes himself aggrieved;...
> 3. By a final judgment in any..... civil case;...
>
> B. Any party to any case in chancery wherein there is an...order;...
> 3. Adjudicating the principles of a cause.

Appellant's standing in court is statutory.

(2) However, in Southern Railway Co. v. Hill, 106 Va 501, 56 SE 2d 278 (1907) the court stated, "If an appeal were allowed immediately from the judgment of a justice (of a court not of record) to this court (Supreme Court of Appeals) we should find ourselves in the dilemma of having no adequate mode of procedure (i.e., a written record) to dispose of it". There one, Hill, got a $9.00 judgment in a Justice-of-the-Peace

Court and the railroad attempted to appeal directly to the Supreme Court.

Mitchies Jurisprudence, Appeals and Errors, p. 557 (Former Law, note) says, "Section 88, Va. Const. (1902) did not confer upon the Supreme Court the right of appeal from a judgment of a justice"..(Southern Ry. Co. v. Hill, supra). And continuing on page 558, "...§ 8.01-672 Code of Virginia (1950), provided for an appeal from a circuit or corporation court to the Supreme Court where the matter involved was 'not merely pecuniary'. These statutes being remedial, were construed liberally so as to effectuate the purposes of their enactment, and, so construing them, they furnished the means of an indirect appeal to the Supreme Court concerning the constitutionality of a statute". Citing again, Southern Ry. Co. v. Hill, supra.

The Supreme Court of the Commonwealth of Virginia has the jurisdiction to hear the case under statute, V. C. § 8.01-670, supra. "Constitution authorizes the creation of courts.....it does not limit or fix jurisdiction...the (courts) have such jurisdiction as may be conferred on them by the general assembly." N.A.A.C.P. Inc. v. Committee on Offenses Against the Administration of Justice, 199 Va 665, 101 SE 2d 631 (1958). The Hustings Court had a right, given it through statute passed by the general assembly, to subpoena witnesses and documents. The Committee wanted the Association's lists of members. The Supreme Court retains matching authority to hear appeals granted by operation of the law.

One Court opted the language of Mitchies Codo 6018 to describe its function, "Appeals and.....warrants re-

moved (from courts not of record) shall be tried according to the principles of law and equity, and where the same conflict the principles of equity shall prevail. No warrent shall be dismissed by reason of the mere defects, irregularities, or omissions in the proceedings before the justice, or in respect to the form of the warrant, where the same may be corrected by the order of the court; but the court to which the appeal is taken, or warrant removed whall retain the same, with full power to direct such proceedings as will tend to correct the defects and irregularities and omissions aforesaid, to promote substantial justice to the parties, and to bring about a trial on the merits of the controversy. This statute shall be liberally construed, to the end that justice be not delayed or denied by reason of errors in the warrant or in the form of the pro-

ceedings; and the courts may make such provisions as to costs...as may be just." See, Copperwhite Pie Corp. v. Whitehurst 157 Va 480 (1932) pages 486, 487.

In Dean v. Paolicelli, 194 Va 219, 72 SE 2d 506 (1952) the court was writing; "(2) The...purpose of the constitution is to shape and fix the limits of governmental activity. It thus proclaims, safeguards and preserves in basic form and pre-existing laws, rights, mores, habits and modes of thought and life of the people as developed under the common law and existing at the time of its adoption to the extent and as therein stated." Citing, Commonwealth v. City of Newport News, 158 Va 521, 164 SE 689. Paolicelli takes a second job in Washington, D.C. and the citizens of Arlington were objecting to the pay he received from them.

Though this case came up on

appeal of an order of the 15th District Circuit Court, it granted no trial on the plea appealed to it prior to the order issued. Now the functions of a circuit court hearing an appeal from a general district court, which same court is not a court of record, is set out in Gemmel v. Svea Fire, etc. Ins. Co. 106 Va 98 (1936). 2) "A court which hears a case de novo, which disregards the judgment of the court below, which hears evidence anew and new evidence, and which makes a final disposition of the case, acts not as a court of appeals but as one exercising original jurisdiction." This Circuit Court refused to do on a direct request offered in a hearing on 10 December 1985 to set a trial date to hear legal and constitutional objections to the expenditure of tax money, adjudicated as debt owed by defendant/appellant, Frederick G. Jensen, in sum tota-

ling to $101.16 by General District Court, Lancaster County, Va. Case in point, Hampton Rds. Sanitation Dist. Comm. v. Arthur Smith, 193 Va 371, 68 SE 2d 497 (1952), "1. Sec. 8-462 to be liberally construed on exceptions to amount of money involved rule., and, 3. Expansion is to be clearly within the 'spirit or reason' of the law." The expansion involved payment by a citizen for sewage service.

Appellant here complains the order out of the Circuit Court commits the tax revenue in question, though but a tiny amount of money, to be spent on families' planning services, consultation, referrals, and abortions performed contrary to the laws V.C. § 18.2-71 to 74.1 and contrary to the constitutions of the State of Virginia Art. I, Sections 1 and 11 and of the United States, the Vth and IXth Amendments.

Therefore, the order entered for Circuit Court itself constitutes the record of fact through which the case can be tried, though no precedent appears, since the dispute in law or equity is a matter of statutes and constitutional law and no dispute exists as upon the amount of the tax. The amount of the tax is the weighty fact in the case. If this case is not heard by the Supreme Court or is remanded to the circuit Court, the record made there might well be no more though no less than the record offered in this plea for an appeal; and a matter so important and so controversial, as persons often opine, could be resolved by a decision swinging insufficient force to provide the remedy decisive to the survival of many of the unborn who will not otherwise see the light of day.

This plea for an appeal will

show, then, the way some laws make abortions possible and how county tax revenues are mingled indistinguishably with State and Federal monies that pay for many. It will demonstrate why § 18.2-71 to 74.1 form laws irreconcilable, vague and confusing on the face and are therefore illegal and unconstitutional. It will show why an unborn human being has a right to life, liberty and security deserving to be weighed in the same balance where the health of the mother trembles at risk--especially before quickening a.k.a. the first trimester.

(3) County departments of public health are required, and also welfare by V.C. §15.1-604 and organized under §15.1-611 while welfare and poor relief are provided by §15.1-607. In § 32.1-30 et. seq., are provided county contracts for required health services with the State Department of Health. Health Directors

for counties are appointed under § 32.1-30 et seq., and §15.1-646.

Health, laboratory, and medical services for medically indigent beneficiaries, through the State Board of Health, § 32.1-5, and a Commissioner of Health §32.1-17, 18 who acts as an executive officer of the board.

The Commissioner chooses the District Health Director § 32.1-31 (d), who is a medical doctor and full-time employee of the State. Prenatal tests for venereal disease are taken §32.1-60. Maternal health service is provided as written in the Social Security Acts, Title V, § 32.1-77 (a); subsection (b) authorizes the State of Virginia to receive and disburse the Federal funds available.

Poor women may receive funds for abortions after rape or incest §32.1-92.1. Refer also, 39 Washington and Lee

also available if a child will be born totally and grossly deformed physically or mentally, §32.1-92.2.

Equal matching funds, private or public, also support health planning ay 6¢ per capita of population (as found for Tayloe Murphy Institute, University ov Virginia) for service or planning agency as grant funds derived of the State Department of Health in order to comply with state and federal funding laws.

The Commissioner applies for and obtains federal cash for the State Health Planning and Development Agency, §32.1-122. Every maternity hospital is obliged to supply patients 'family planning information' unless there are religious and moral objections on the hospital's part, §32.1-134. The act autho-

rizing the State Board to enter into agreement with the Federal government for facilities, under the Social Security Act's Title XVIII.

V.C. Title 32.1-264 requires reports of fetal deaths, medical certificates, investigation by the medical examiner, and confidentiality of information concerning abortions done by doctors. V.C. Title 32.1-249 (2) sets up a legal definition of a fetal death, (11) and (12) define 'vital records'. "A fetal death report...shall be filed...with the registrar for the district in which the delivery occurred or the abortion was performed within three days."

The law makes possible the movement of local revenues to the State level (County contracts, §32.1-30). the money, and more, comes back as welfare and poor assists, §15.1-607, through the organizational structure §15.1-604, §

15.1-611, §32.1-30 and §15.1-646. Laboratory services are available by the State to local indigents §32.1-5, §32.1-17, 18. Federal aid provides maternal health services § 32.1-77 (a), (b) with State supervision §32.1-31 (d).

Poor women receive abortion funds in cases of rape or incest, and anticipating deformed infants §32.1-92.1, § 32.1-92.2. Planning funds from all levels of government are sent in various ways §32.1-121.1, §32.1-122, and §32.1-134.

Various statistics on abortion are found recorded in 'vital statistics' annually published by the State's medical health authorities §32.1-264, §32.1-249 (2), (11) and (12).

At this point the reader will have a grasp of the way public money and health services account for some abortions.

While Baby Roe, the unborn infant in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35L. Ed. 2d 147 (1973) had neither parental representation in the U.S. Supreme Court nor anyone acting guardian ad litem, p. 162 and footnote 66, this Court stated, "...the unborn have never been recognized in law as persons in the whole sense." (p. 162) The Court appears to hold the unborn are persons in any sense only prospectively, ".....the fetus, at most, represents only the potentiality of life." Here, Too, the Court speaks of the operation of law. Thus Baby Doe may have been no more than a hypothetical one in the mind of the Court, a pure creature of that mind.

Consider Blackstone on the same subject: Commentaries on the Laws of England, Book I, notes by George Sharwood, J. B. Lippencott Co., Phila., Pa., 1893, pages 128, 129:

> "I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. 1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of the law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this though not murder, was by ancient law homicide or manslaughter (Bractonl 3, c. 21). But the modern law doth not look upon this offense in so atrocious a light, but merely as a heinous misdemesnor. (3 Inst. 50).

Yet, the Court stated a legal exception to its theory of potential (prospective?) existence. "In areas other than criminal abortion the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth." Roe, supra, p. 161. It is not clear that the Court was wholeheartedly convinced that criminal aborticide and law by which it was morally

bound, because it approved aborticide, seemingly, for a liberal's packet of various and one or two legal reasons. Roe, supra, p. 153.

Sompare Blackstone, supra, Book IV, Public Wrongs, p. 198:

> "To kill a child in its mother's womb is now no murder, but a great misprison; but if the child be born alive and dieth by reason of the potion or bruises it received in the womb, it seems by the better opinion, to be murder in such as administered or gave them."

In the time of King George III to do or assist at any abortion after quickening was a legal felony punishable with death. Where a woman was not, or not proved to be pregnant, attempted abortion was a legal felony punished by transportation. Ibid.

Whether one speaks of abortion as a misdemeanor great or heinous, or a felony guilty of death or transportation, a slightest trace of an emerging private right to abort is not found. The time

was 200 to 400 years ago.

Furthermore, when contemplating 'life as we know it', the Court wrote, "...embryological data...indicate that conception is a 'process' over time, rather than an event, and (event) by new medical techniques such as.....artificial insemination, and even artificial wombs." (p. 161, Roe, supra). Clearly, the same Court that stretched the law for potential life is quite capable of contemplating the fact of existence retrospectively in the person of the unborn to a time when a physical being is not factual, i.e., prior to conception. No court has sharpened its comprehension of the 200 years known constitutional right to life, liberty and happiness to "This view...posed...by new embryological data." Roe, supra, page 161. It applies a rule of law--life begins at birth--rather than a constitutional principle to a new

set of facts: This legal right to life has no validity, meaning or existence if it does not inhere in a life actual and factual. Certainly, this is the thrust of Blackstone's writing.

The Court caroms off this conclusion by centering into the 'right of privacy'. Out of context, one can consider the phrase as a euphemistic way to refer to vague individual rights, which we never refer to directly because they follow things sexual, about which we may be shy. Such was not fact in Griswold v. Connecticut, 381 U.S. 479 (1965) when Justice Douglas (deceased) referred to the right of marital privacy. (Emphasis supplied.)

There is little doubt the Court in Roe v. Wade speaks of the same thing, marital privacy, though Jame Roe appeared as a single woman. Individual, private rights being implied only under

the IXth and Xth Amendments to the U.S. Constitution, she undoubtedly had a right to have a child, which she did in the event, and a right to have a husband in the shape of the father of the child. While the conduct suggested was legal and moral, then, the Court nevertheless stated, "This right of privacy whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action...or...in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (page 153). See besides p. 159 where the Court says of United States v. Vuitch 402 U. S. 62, 19 S. Ct. 1294 (1971), "....we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termi-

nation of life entitled to Fourteenth Amendment protection." The Court was alluding to its confession in Roe, supra, p. 158, 159, "If this suggestion of personhood is established, the...case...collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment". (the Fourteenth)

This is the question appellant wishes to raise in the case, since the Baby Roe fetus was not a party to the famous abortion case. The analysis of Roe, above, demonstrates how the Court arrived at its comparative standard in forming the compelling state interest test, to draw forth the rights for life and health of the mother versus the unborn child. (See, Roe, supra, page 173, where Justice Rehnquist cites Weber v. Aetna Casualty and Surity Co., 406 U.S. 164, 179, 92 S. Ct. 1400, 1408, 31 L. Ed. 2d 768 (1972), dissenting opinion.)

In a Roe dissenting opinion Rehnquist, J. states, "To reach its result, the Court necessarily has to find within the scope of the Fourteenth Amendment a right that was completely unknown to the drafters of the Amendment". Roe, Ibid., p. 174. Two amendments, the Thirteenth and Fourteenth, were ratified by the democratic majority that appeared out of the Civil War. Nevertheless, the practical result of the amendments was to prevent any person from being born into slavery in the United States. The right to life was already secured by the words of the Fifth Amendment, "...nor shall any person....be deprived of life, liberty, or property, without due process of law". The words of the Fourteenth Amendment say, "....nor shall any State deprive any person of life, liberty, or property, without due process of law". Nobody was taking the life of a

slave; the right to liberty and, the fruits of his work were at issue. Further, though it is not generally remarked in our histories, the marital rights of slaves were also an issue.

In Dred Scott v. Sandford, 8 How. 393, p. 406, a U.S. Supreme Court said the question was one of citizenship, --not of privacy, as we believe today-- that was the source of this right to life, liberty and property. The Court was speaking of birthright, then, and this is surely the meaning enclosed in the Fourteenth Amendment to the U.S. Constitution. Those judges held the words of the Declaration of Independence did not apply to slaves, or their descendants, p. 407. It swept state constitutions in its purview, p. 409. See also, words about the Declaration of Independence, pages 409 and 410.

There was in the Dred Scott

Case, supra, a suggestion that the Fifth Amendment of the U. S. Constitution protected, not the enslaved person's life, but obliged every one of the states of the union to respect the 'property' of the master, said to be his slave. (Pp. 624 to 627). Justice Curtis dealt with this argument on dissent. He notes the right is traced to the Magna Charta. (See Chapter 39 of that document). An apparent contradiction arises because it is not possible now to enjoy life without liberty or liberty without property. A condition of legal freedom is described by these three terms and freedom does not exist where that of one person is based upon the deprivation of another.

Whether this freedom operates upon personhood, birth, citizenship or privacy, it is meaningless unless it benefits individuals exercising their freedom in active relationships with one

another. Nome of this language remotely pictures a mother about to abort her 'potential' child. There is more, namely, marital or family rights.

In Griswold v. Connecticut 381 U.S. 479 (1965) people who were married had certain rights of marital privacy under implication from the Bill of Rights, page 485. "The present case (Griswold), then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." The Court held a law forbidding the use of contraceptives by married persons was therefore unconstitutional. Though the right of privacy ('marital' went lost) was extended in 1971 by Eisenstadt v. Baird 404 U.S. 438 for single persons, page 442, ".....we hold that the statute, ...violates the rights of single persons under the Equal Protection Clause of the Fourteenth

Amendment", it was not a great time later in Roe, supra, in 1973, that abortion was held to be a constitutional right. (See Redlich, Are there 'Certain Rights....Retained by the People'? 37 N.Y.U.L. Rev. 787, 798--"The law is unconstitutional--but why?") In these cases and with this rational the Court interpreted the plain words and the Fifth Amendment protecting life, to guarantee the rights of the mother and her doctor to terminate human life. Never has this been done since the day of Scott v. Sandford, where the same rational was used to support the master against the slave.

A most significant comment about the woman's right of privacy appears in Roe, supra, p. 159, B. "The pregnant woman cannot be isolated in her privacy, She carries an embryo and later, a fetus..." and, "....it is reasonable.....to decide that at some point in

time another interest, that of potential human life, becomes significantly involved." Hear further, ".....any right of privacy she possesses must be measured accordingly." It is here clear the Court holds that the mother's constitutional right can be curbed by some interest of the state's, but what sort of right the unborn carries at this point, which is the subject of the State's new concern, is not so clear. In fact, the fetus' potential life is just as real at the moment the state's concern arises, as was the right of the fetus to inherit, or to be represented in court by a guardian ad litem, Roe, supra, p. 162.

When the Court proceeds to note, "We need not resolve the difficult question of when life begins", the truth could be, that it does not recognize the unborn as human life anyway, and surely not as life in the whole sense; Roe, p.

162. Blackstone indicates more certitude, Commentaries, supra, p. 129, ".... it (life) begins in contemplation of the law as soon as the infant is able to stir in the mother's womb". Baring recognition by the Court, the unborn infant is deprived of a hearing on its Fifth Amendment rights, which are its due. A chancy potential for life or death at the hands of a doctor, is all that is left to the unborn in the absence of the help due under the Fifth Amendment.

What we now spy on the American legal horizon, is two polarized life styles, one of which is disgustingly alien for our constitution. A like case is that of Dred Scott, supra, especially where it refers to certain marriages.

> "The (Massachusetts) law of 1786.... forbids the marriage of any white person with any negro, Indian, or mulatto, and declares all such marriages absolutely null and void, and degrades thus the unhappy issue of

the marriage by fixing upon it the stain of bastardy," (p. 413)

Quoting Tit. 4th. De Ingenuis.--"A freeman is one who is born free by being born in matrimony, of parents who are both free, or both freed: or of parents one free and the other freed. But one born of a free mother, although the father be a slave or unknown, is free." (p. 479)

"It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere; and that no technical domicil (sic) at the place of the contract is necessary to make it so." (p. 599)

"...the law does not enable...anyone ...to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery." (p. 601)

The degree of polarization that has already developed may be indicated by reference to Hunter v. Wheate, decided 7 May 1923 by the Court of Appeals of the District of Columbia, 289 F. 604, where the court said, "It is hardly necessary to say that in volun-

tarily participating in the miscarriage upon herself the appellee engaged, not only in an unlawful act, but also in one which was immoral, without regard to the question of whether or not she was quick with child," Today the immoral act is dignified by constitutional plaid!

The court threw both the patient and the doctor doing the abortion out of court, noting Higgins v. McCrae 116 U.S. 671, 6 S. Ct. 557, 29 L. Ed. 764, "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

(4) Crimes and Offenses Generally, Virginia Code, Article 9, deals with abortion. There, § 18.2--71 prohibits abortions generally, "Except as provided in other sections of this article,....". Subsection 72 permits abortions to be performed in the first trimester of pregnancy. Different words relate the per-

mitted and forbidden acts, but not wholly different.

Subsection 71 forbids "any person" and 72 makes legal "Any physician licensed by the Virginia State Board of Medicine to practice medicine and surgery,....". The object with both is "a woman" in 71 and "any woman" in 72; and "her unborn child" in 71 and "a human pregnancy" in 72. An act not legal is to "administer to, or cause to be taken ...., or use (means).....". The legal act is "performing...or causing (a miscarriage)....". The "....intent to destroy...or to produce...., and thereby destroy...." is illegal. Permitted is the "....termination (of a human pregnancy) by 72. The law tells a person, "...he shall be guilty..." of "....abortion or miscarriage,...." in 71. For a doctor "...it shall be lawful...." to do "....an abortion....or a miscarriage..."

under 72. Therefore, it is plain the real difference in the two subsections is not in the acts alone, but in the persons upon whom they operate.

Under the statute, subsection 71 as it is worded now, is not clear on a woman who operates or takes a drug for her own interest, if she is guilty of a felony? Since she lives under a constitutional right to abort, this statute could be unconstitutional on that ground.

However, the proper view to take is that the law lies upon all, including the women, and that it means to penalize the action of abortion: And, that a doctor, per se, offers his aid only as his medical diagnosis and prognosis will indicate.

There is no question the doctor can proceed assuredly under § 18.2--74.1 "...by performing an abortion or causing a miscarriage on any woman in

order to save her life". Danger to the life of the mother will develop into the direct cause of the death of the child. Therefore, it cannot be imagined the doctor is the "cause" of anything, except indirectly. A case in point is Shirley v. Bacon 154 Ga. App. 203, 267 SE 2d 809 (1980) in which a doctor performed an abortion upon a woman whose pelvis had been injured in an auto accident. It was held to be a homicide due to the accident. Had a normal delivery occurred, no abortion would have been done, one can assume.

The doctor who operates under § 18.2-74 is in the same position as above, he is attempting to relieve human trauma, not necessarily to destroy the child. The statute sets up a life support system for the infant, which can be expected to be viable in the third trimester. Roe, supra, p. 159, says, "Via-

bility is usually placed at about seven months (28) weeks but may occur earlier, even at 24 weeks." (See note, 60) Akron v. Akron Ctr. for Reproductive Health, 76 L. Ed. 2d 687, 720, 721 and note 5, where viability is earlier still at greater chances of survival. Here there is a legal medical reason for the abortion and no question of destroying an unborn as under §18.2-71.

The medical indication for abortion under §18.2-74 is the "pregnancy is likely to result in the death of the woman or substantially and irremediably impair the mental or physical health of the woman". The words used in subsection 72 as well as those in 73, contain no such indication. Were such legal medical indications for abortion contained within the words of these subsections, they would distinguish legal from illegal abortions and miscarriages,

which are now known only by the words "destroy her unborn child" and, "terminate a human pregnancy". There is no doubt that most deliveries, whether in the first or in the second trimesters, will be an end, as likely before as after birth, depending on the technique or method used by the physician or surgeon.

The method of dilation and evacuation indicated right at about 12 weeks comes to neither abortion nor miscarriage. By this method suction is aimed to sever the "fetal product" limb from limb, finally crushing the head with a forceps and removing it through a limited aperture. The technique means various portions of the human body must be counted until the whole is made up again to assure complete removal and remove thereby the danger of infection. (See, "The Silent Scream")

cated at an early stage of pregnancy and involves removing all content from the womb by scraping. The surgeon uses an optical device to scan the surface upon which he works. This is no kind of abortion or miscarriage either. Both the D & E and the D & C are forced removals, the one by suction and the other by scraping.

Amniocentesis is described in a footnote to the case, Simopoulis v. Commonwealth of Virginia 277 SE 2d 194, placed on page 196. A twenty per cent solution of sodium chloride, N_aCL, is introduced into the uterus. The saline fluid urges an abortion because it is toxic. It is not at all certain a live-birth or stillbirth (miscarriage) will result when using this method. In the Simopoulis Case the infant aborted grew in gestation for five and one--half months.

Prostaglandins are drugs used for abortions indicated in the period covering 12 to 20 weeks gestational age beginning at the first day of the last normal monthly period. By insertion into the vagina in suppository form, the uterus is stimulated to contract in a way that simulates normal birth. Prostaglandins can also be administered intramuscularly, and by a transabdominal tap of the amniotic sac. Where the fetus has reached viability, these drugs are not used. None is an agent for feticide, because they do not appear to affect the fetoplacental unit. A fetus delivered by prostaglandins may exhibit passing signs of life. The drugs are recommended to use by medical personnel in a hospital having intensive care facilities and acute care surgical facilities. (From: Facts and Comparisons, September, 1985)

Thus modern medical science can deliver in the second trimester a live or dead fetus at will, depending on whether prostaglandin or amniocentesis is used to abort or miscarry. In Planned Parenthood of Missouri v. Danforth 428 U. S. 52 on pages 75 to 79, a 1976 case, there is a discussion regarding comparative problems when using amniocentesis v. prostaglandins. There the court decided prostaglandins were not often available, while the saline abortion method was safer than a normal delivery. Amniocentesis was not to be called illegal because it would deny abortions in too many cases. Actually amniocentesis was declared "legal", as a method. This court did not draw near to cope with the issue of feticide v. livebirth, or aborticide v. miscarriage.

It is curious to note that an attempted abortion on a woman pregnant

or one not proved to be pregnant was a felony meriting 'transportation' in the time of George III in Great Britain. See page 13, above.

The method of amniocentesis will most often produce a stillbirth, and so, rests in the latticework of the Virginia statute's term 'miscarriage'. Prostaglandins will with most cases result in abortions and this also conforms to the term used by the law. It is not at all clear whether a homicidal attack upon the person of the fetus, called 'feticide' among medical literati, is permitted by the spirit of the law. In subsections 73 and 74 of Title 18.2 specific regulations are found for the survival of the fetus, born alive. Subsection 72 makes no provision for any survival, which may occur, nor for any medical instruction of the kind that is part of both subsection 73 and 74.

The statute is vague in delineating the medical terms from the legal, as between subsection 71 and 72, 73, 74, nd 74.1. It is confusing where it supplies medical guides, see subsections 73 and 74, but fails to do so in 72, because it suggests that the same behavior is legal and moral on one hand, while illegal and immoral on the other.

Since V. C. § 32.1--92.1 may grant revenue to poor women for abortion after rape or incest, and for abortions when a child may be born totally and grossly deformed mentally and physically, one can assume such abortions are permitted in the first trimester. However, there is nothing in its term anywhere that states what is the invariable medical reason that demands abortions be performed in any of these cases.

Roe, supra, p. 153 declares the economic, medical and psychological

reasons that are grounds supporting a mother's choice to abort, at least in the first trimester. Little of this is made explicit in the Virginia statute. In addition, Roe says, "In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. ....these are factors the woman and her responsible physician necessarily will consider in consultation." It would be interesting to read the statute of a Solon taken to clothe the consultation, on a legal stigma attaching to unwed motherhood and bastardy, in the cloak of the Doctor-&-Patient relationship.

RELIEF REQUESTED

(1) A declaration that the life of the fetus is protected in the contemplation of the law under the Constitution of the Commonwealth of Virginia, Article I, Sections 1 and 11, and the Constitu-

tion of the United States, Amendments the Vth and IXth from the moment the senses perceive it, with or without instruments, electronic or otherwise as the said life is defined in V. C. Title 32.1-249 (2), movement of the voluntary muscles, pulsation of the umbilical cord, or detectable heartbeat, whether inside of the womb or out of it.

(2) A declaration that any law criminalizing abortions is constitutional only when physicians, surgeons, or other trained or licensed persons practicing medicine are free under it to advise, intend, and perform such medical abortions capable of ameliorating the traumas of their patients, specifically the mother and her unborn child. In each case of any physician or surgeon, charged under such constitutional abortion law, every such physician or surgeon shall have as a sufficient defense,

the medical rational that indicated abortion relief of the traumas reasonably diagnised or found by himself or his colleagues.

(3) An order of the court mandating Novella W. Abbott, Lancaster County Treasurer, appellee, to return to Frederick G. Jensen, Appellant, the sum of all interest and penalties charged on taxes due in this case.

(4) Costs of legal fees and publication.

CONCLUSIONS

(1) Appellant has standing to appear under statute.

(2) Sufficient precedent exists to permit the Supreme Court to hear this case on the basis of the record available and presented.

(3) The right of a living human fetus to the protection of law is a material issue of right within the duty

and power of the Court to declare.

(4) The constitutionality of the present state abortion law is a meterial question of law.

(5) Appellant is entitled to personal relief.

THEREFORE: Appellant prays the Court that an appeal may be granted as appropriate, that the judgment of the Circuit Court be held in abeyance in favor of appellant, that proper trial be awarded the appellant on the issues presented, and that award of the remedies prayed be granted.

Respectfully submitted,

/S/_____

Frederick G. Jensen
P. O. Box 372
Irvington, Virginia
22480

IN THE

SUPREME COURT OF VIRGINIA
Richmond, Virginia

Frederick G. Jensen,
Appellant,

v.

County of Lancaster
Novella W. Abbott, Treasurer,
Appellee.

BRIEF IN OPPOSITION

To The Honorable Chief Justice and Justices Of The Supreme Court Of Virginia:

The County of Lancaster, Novella W. Abbott, Treasurer, by its attorney, respectfully submits the following as its brief in opposition to the petition for appeal filed herein.

MATERIAL PROCEEDINGS

On December 10, 1985, Frederick G. Jensen appeared pro se on a de novo appeal to the Circuit Court of the County of Lancaster on a warrant in debt for 1983 personal property taxes in the amount of $101.16 plus interest and costs. By order entered December 23,

1985, the Circuit Court of the County of Lancaster give judgment in favor of the County of Lancaster, Novella W. Abbott, Treasurer, against Frecerick G. Jensen in the amount of $101.16 with interest thereon at the judgment rate from the date of judgment until paid plus costs of court.

STATEMENT OF FACTS

The written statement of facts endorsed by Frederick G. Jensen and counsel for the County of Lancaster state the facts, but said written statement of facts does not comply with the Rules of Court and is not signed by the trial judge.

The record indicates the amount in controversy to be $101.16.

The record indicates that Frederick G. Jensen "averred his tax question was settled in the court below, and stated there was no dispute as to

the facts on the questions of his personal property tax payment but its public expenditure for abortion purposes."

ARGUMENT

There is no material fact cognizable by this court in dispute. The petitioner has stated that the tax question was settled and that there was no dispute as to the facts. He seeks to use this forum to raise issued not properly before this or the trial court. This court does not render advisory opinions on matters not in issue.

The amount in controversy is $101.16 plus interest and costs. This amount is less than the $500.00 jurisdictional amount of this court. Va. Code §8.01-672.

Where the parties have had a fair trial, and substantial justice has been attained, this court should neither award an appeal nor reverse the judgment

of the trial court.

CONCLUSION

The County of Lancaster, Novella W. Abbott, Treasurer, by counsel respectfully urges this court to deny the petition for appeal.

COUNTY OF LANCASTER
NOVELLA W. ABBOTT, TREASURER

By C. Jeffers Schmidt, Jr.
Of Counsel

C. Jeffers Schmidt, Jr.
Commonwealth's Attorney
P. O. Box 204
Lancaster, Virginia 22503
804-462-7240

WARRANT IN DEBT

VA. CODE ANN. § 16.1-79

Lancaster — CITY OR COUNTY — General District Court

Rt 3 Lancaster, Va 22503 — STREET ADDRESS OF COURT

TO ANY AUTHORIZED OFFICER: You are commanded to summon the Defendant(s).
TO THE DEFENDANT(S): You are summoned to appear before this Court at the above address on September 17, 1986 at 2:00 pm — RETURN DATE AND TIME — to answer the Plaintiff(s)' civil claim (see below).

8-25-86 — DATE ISSUED

B M VanDevan — ☐ CLERK ☐ DEPUTY CLERK ☐ MAGISTRATE

Claim: Plaintiffs claim that Defendant(s) owe Plaintiff(s) a debt in the sum of

$ 87.36 net of any credits, with interest at 12 INTEREST RATE % from Date of Judgement DATE FROM WHICH IS DUE until paid.

$ -0- COSTS costs, and $ -0- ATTY FEE attorney's fees with the basis of this claim being

☐ Open Account ☐ Contract ☐ Note ☒ Other (EXPLAIN) 1984 taxes

Personal Property

Homestead Exemption waived? ☐ Yes ☒ No ☐ cannot be demanded

8/25/86 — DATE

Noveller W. Abbott — ☒ PLAINTIFF ☐ PLAINTIFF'S ATTY ☐ PLAINTIFF'S EMPLOYEE

Case Disposition

JUDGMENT that Plaintiff(s) recover against ☐ named Defendant(s) ☐

$ ..... net of any credits, with interest at ..... INTEREST RATE % from ..... DATE FROM WHICH IS DUE until paid.

$ ..... COSTS costs, and $ ..... ATTY FEE attorney's fees with the basis of this claim being

Homestead Exemption waived? ☐ Yes ☐ No ☐ cannot be demanded

☐ JUDGMENT FOR ☐ NAMED DEFENDANT ☐ .....

☐ NON-SUIT ☐ DISMISSED .....

Defendant(s) Present? ☐ Yes ☐ No .....

..... DATE — ..... JUDGE

FORM DC-412 5/86 (114 5-102 5 86)

RETURN DATE 9-17-86 — CASE NO. 86-269

County of Lanca[illegible] — PLAINTIFF(S)

Novella W. Abbott, Treasurer

$72.20 TAX

V.

Frederick G. Jensen — DEFENDANT(S)

P.O. Box 372

Irvington, Va 22480

Town of Irvington

WARRANT IN DEBT

RECEIPT NO.	DATE FEE RECEIVED
—	—

TO DEFENDANT: You are not required to appear; however, if you fail to appear, judgment may be entered against you. See the additional notice on the back side. To dispute this claim, you should appear on the return date:

☒ to try this case.

☐ for the judge to set another date for trial.

Bill of Particulars ..... ORDERED ..... DUE

Grounds of Defense ..... ORDERED ..... DUE

ATTORNEY FOR PLAINTIFF(S)

C. Jeffers[illegible]t, Jr

ATTORNEY FOR DEFENDANT(S)

(2)

DOCKET NO. 86-707

IN THE SUPREME COURT
OF THE
UNITED STATES

FREDERICK G. JENSEN,
PETITIONER,

v.

COUNTY OF LANCASTER AND
NOVELLA W. ABBOTT, TREASURER,
RESPONDENT,

SUPPLEMENTAL BRIEF

In The Matter Of

A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA
AT RICHMOND

Frederick G. Jensen,
Pro se
P. O. Box 372
Irvington, Virginia
22480

15 pp

QUESTION PRESENTED

1. Does a woman's constitutional right to 'elect' abortion sweep so widely as to determine the application of the common law of torts and the application of wrongful-death statutes to cases of 'wrongful pregnancy, contraception, or birth' as well as wrongful death?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

United States Constitution:

Amendment IX: The ennumeration of... certain rights shall not be construed to deny (all) others retained by the people.

Docket No 86-707

IN THE SUPREME COURT OF THE UNITED STATES

Frederick G. Jensen, Petitioner,

v.

County of Lancaster and Novella W. Abbott, Treasurer,

A SUPPLEMENTAL BRIEF, in the matter of A Petition for Writ of Certiorari to the Supreme Court of Virginia at Richmond.

OPINIONS BELOW

16 October 1985: Defendant was denied his plea in Lancaster County Court upon taxes levied by Novella W. Abbott, the County Treasurer on the ground that the abortion laws of the State were illegal (Title 18.2-71 to 74.1) and because the unborn may not be deprived of life under Art. I, Sections 1 and 11 of the State's Constitution and Amendments V and IX of the Constitution of the United States. The tax was a personal property tax on a light truck at that time under a lien for a tax-claim of the Internal Revenue

Service, which was subsequently siezed and sold at auction by the I.R.S. (See, Jensen v. U.S., Docket No. 86-278 in the Supreme Court of the United States.)

10 December 1985: Upon payment of cash bond for payment of tax claim, Circuit Court 15th District at Lancaster County Courthouse refused to hear defendant's constitutional and legal objections to certain abortions as made in the court below and, ordered the taxes paid.

10 March 1986: Defendant filed in the Supreme Court of Virginia an appeal as above. Record No. 85-922.

25 April 1986: Virginia Supreme Court decides Miller v. Johnson, Rec. No. 84-1536 (Advance Sheets) upholding a right to sue in tort to recover for 'wrongful pregnancy' and 'wrongful conception', in 231 Va. 177, (1986).

5 September 1986: Virginia Supreme Court decides Modaber v. Kelley, Record No.

83-0774, (Slip notes) upholding a $750 thousand dollar judgment where a mother sustained injury due to medical malpractice that resulted in the stillbirth of her child. (See, page 9.)

17 September 1986: District Court, Lancaster County renders an oral judgment for additional taxes due on the same and identical truck, the subject of local and Federal tax action as mentioned.

20 September 1986: Virginia Supreme Court denies the appeal of defendant in Novella W. Abbott, Lancaster County Treasurer, v. Jensen, above.

FEDERAL RULES

This brief is submitted under Rule 22.6: Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases....or intervening matter not available at the time of the party's last filing.

STATEMENT OF FACTS

Upon denial of defendant's appeal it was not possible from the record to ascertain any reason for the denial, except that the Court intended to uphold the objection of Commonwealth's Attorney, C. Jeffers Schmidt, Jr., that the Court had no power to hear a law case under $500. However, the decisions the Court handed down meanwhile, as above, as this case was in process were surely fresh in its mind when it denied the appeal.

In Miller v. Johnson, above, on page 182 the court said:

> "We see no reason not to apply traditional tort principles to determine whether a cause of action exists for wrongful pregnancy or wrongful conception, where the child is reasonably healthy, both physically and mentally.
>
> "...a woman is entitled to have an abortion if she so choses, See, Roe v. Wade, 410 U.S. 113, 153-154 (1973); Code §18.2-71 to 76.2. Individuals are likewise free to practice contraception to further their constitutionally protected choice not to have

children. See Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965)."

And page 187,

"We are unwilling to hold that as a matter of law the birth of a child, even a healthy child, can never result in a tortious injury to the parents."

In Modaber v. Kelley, above the court found, page 6:

"...fetal death occurred while the infant was joined to the mother." (three weeks prematurely).

and page 5:

"...that premature separation of the placenta from the uterine wall caused death...(by) depriving the fetus of adequate oxygen." and, "Efforts to resuscitate the infant were unsuccessful."

The court concluded, page 10:

"...trial court did not err by instructing the jury that 'injury to an unborn child in the womb of the mother is to be considered as physical injury to the mother' and by permitting the jury to assess damages for injuries and mental anguish suffered by her as the result of the fetal death occuring while the infant was part of her." (Citing Miller).

The court also said, page 9:

> "She (the mother) may not be compensated for an expected loss of income of the child or for services, protection, care, or assistance expected to be provided by the child had he lived." See Code §8.01-52.

The ground for such compensation must have been Code §8.01-50, "....the death of a person...caused...by the wrongful act, neglect or default of any person...".

REASONS FOR GRANTING WRIT

While there may be some confusion about just when Baby Kelley died there is no doubt that the word the court uses to describe the unique event: It uses the word 'death'. It then decides 'death' is the basis for the recovery in tort and the failure to recover under statute. In order to make the one word 'death' have two different legal effects the court adopts the theory that death is one thing when the child is attached to the umbilical cord, but some-

thing different when separated from the mother.

It is not clear where equity lies because the court could well have been faced with a jury holding the child died under resuscitation, and had lived for a time separated from the mother. What is very clear is the court's action trying to reconcile tort and statutory recovery with its understanding of Roe, Eisenstadt, and Griswold, above. The successive holdings are giving rise to ludicrous law. How can one ask a jury to decide damages for wrongful abortion and wrongful birth? Where one sues for wrongful life the law perhaps has power to restore him 'whole', i.e., by reduction to a former state of non-existence. Ludicrous without doubt!

What seems to be no laughing matter is the legal obligation of the doctor in one case to save life and to

kill in another. One might ask, what is insurable interest, qua medicus, in a purchase of malpractice insurance? Can the unborn suffer a worse injury than destruction at the mother's option?

In property law the unborn is entitled to care and maintenance out of the estate devised to him, through his guardian ad litem. In colonial Virginia a slave in the womb was property independently devisable and not a part of the mother.

Toth v. Goree, 65 Mich. App. 296, 237 N.W. 2d 297 (1975) has a discussion of the 'Dietrich Theory', p. 305:

> "The Dietrich case announced a theory that an unborn child was part of its mother. ...The Dietrich theory resulted in a rule of recovery (in tort) limited by the viability distinction. But, the usefulness of that distinction has disappeared with the modern repudiation of the Dietrich theory."

The court also said on page 301:

"There would be an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act.[8] (See footnote)

What can show more terrifyingly the viciousness with which the Roe Court's theory of comparative advantage tears apart the fabric of our law?

ARGUMENT

The law of this nation governs the behavior of a man toward his neighbor. Where one is injured by another our law will grant him his remedy, so as to restore him whole where possible.

Life is the most treasured thing protected by the law. It is an inalienable right. The right does not arise as a result of the state's interest, as in the mother or in the child. Neither does the right come and go upon the will of the mother or other parent, as in Roe. The sex factors of life, too, deserve a respect they are not given in

Griswold and Eisenstadt. Blackstone, Commentaries, Vol. I, p. 129 records, life begins in the contemplation of the law from the first moment that it begins to stir in the womb.

Sovereign power in a democracy remains with the people. (Constitution, Amendment IX) It is an ancient rule of law that the King can do no wrong, i.e., all government is under the law. No institution of modern law is above the law, including the Supreme Court of the United States. The common law is part of our constitutional structure, too. The Supreme Court has the power to set aside unconstitutional statutes, even abortion laws. It does not have the power to set aside the common law, which makes abortion a common law misdemeanor, great and heinous.

It is no argument to question the principle that the law protects life

by asking, "What is life?" It is not a new question. Jesus said, "Respect your neighbor", and the lawyer probed,

"Who is my neighbor?"

Life is a matter of objective fact. The law cannot restore the person killed wrongfully. Thus, it cannot hear him or give him a remedy. Neither can a court hear the unborn before he is objectively present in the womb of the mother.

Motherhood is also something objectively perceived. The woman who destroys the child in her womb is behaving unnaturally. How will we make a law that will protect the child's life in the womb against attack by its own mother or father? Or, what kind of law is it that makes of motherhood a legal concept variable at will?

The inscription above the step of the Courthouse protects the senile, comatose, sick, minors, infants at the

breast. What is the species of legal blindness we suffer when we do not see that the unborn has life, too?

The fact of life here in the United States is 1.2 million abortions each year at a rate of one abortion for two normal deliveries. While the problem is largely one of legal origin, it is not at all certain the Court's fiat will once again restore respect for life.

CONCLUSION

This case, 86-707 and, 86-278 present a twinned opportunity for the Court to declare, enjoin, and mandate due constitutional protection for the life of the unborn.